Filed 8/19/04 Marriage of Ballerini CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re the Marriage of DANA and KAREN BALLERINI.	
DANA BALLERINI, Appellant, v. KAREN BALLERINI, Respondent.	A101834 (Alameda County Super. Ct. No. CV019492-1)

I. INTRODUCTIION

Appellant Dana Ballerini (Husband) appeals from an order of the Alameda County Superior Court which denied his motion to reduce his child support payments because of alleged changed circumstances and awarded respondent, Karen Ballerini (Wife) attorney fees. We affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

Husband petitioned for dissolution of his nine-plus year marriage in October 2000. The couple has two children, then seven and five years old. At the time he filed his petition, Husband was operating a chiropractic business in Livermore, Alameda County. A valuation of that business, a sole proprietorship, was ordered by the court pursuant to

Family Code section 730.[1] The section 730 report, dated September 10, 2001, valued Husband's business at slightly under $51,000. However, according to statements of counsel at oral argument on the motion in question, Husband eventually sold it for well over that amount—either $63,000 or $77,000 depending on which version one credits.[2] Wife was supposed to receive, via monthly payments, $7,500 of the balance of this amount left over after the payment of community debt.

The section 730 report also determined that Husband "has $8,490 per month in self employment income . . . ." Based on this, in December 2001 the parties stipulated that Husband would pay $3,730 by way of unallocated family support. (See § 4066.)

Apparently shortly after his 2000 separation from Wife, Husband moved to Southern California and began living with a new girlfriend. He then entered into an arrangement with two Southern Californians, under which he was to become either "an employee of a corporation" (Husband's version) or a partner in a chiropractic business in Santa Monica (the version manifested by a document entitled "partnership agreement" given the court by Husband's counsel). In whichever capacity, he anticipated earning $12,000 a month. But, according to Husband and his attorney's statements at the hearing on his motion, he in fact earned only $3,000 in all before the arrangement collapsed. Husband stated to the court that he was currently "in negotiations" and "working with a mediator" with regard to the alleged breach of the agreement with the two Southern Californians. In any event, in his September 25, 2002, motion to the court, he claimed to now have "net disposable income" of only $827 per month. That motion concluded with the statement: "Plaintiff (sic) has relocated his practice, and his income has been reduced. He is unable to pay the current support amount."

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[1] All further statutory references are to the Family Code unless otherwise noted.

[2] Although both parties were sworn at the hearing on Husband's motion, neither testified. Most of the "facts" presented there were by way of the arguments of counsel. Further, there is precious little by way of declarations or other tangible evidence in the clerk's transcript provided us. We are left to try to determine the underlying facts from that sparse transcript and uncontested statements of counsel and Husband at the hearing.

After oral argument by counsel and, as noted, a few statements by Husband, the court denied his motion and granted Wife's motion to recover attorney fees in the amount of $1,500.[3] Husband filed a timely notice of appeal.

III. DISCUSSION

Our standard of review of an order of a family law court regarding support obligations is abuse of discretion. (See, e.g., *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 994 (*Hinman*).) Husband maintains there was such an abuse here; we strongly disagree.

Our disagreement is based largely on the fact that the record before us does not begin to explain why an individual who was found by a supposedly impartial outside expert to have a monthly cash flow of almost $8,500 in September 2001 could reasonably be found to have a "net monthly disposable income" of only one-tenth of that amount a year later.

More specifically, the family law court was obviously troubled, as are we, about the alleged new business venture whose failure led to the motion at issue here. Indeed, the court specifically asked to see, and then reviewed, the alleged "partnership agreement" and clearly found it more than a little puzzling. Twice, the court referred to the whole purported Santa Monica arrangement described by Husband and his attorney as "bizarre." Part of its puzzlement was because it was presented with a document only five paragraphs long but entitled "partnership agreement." But it surely also found troubling the fact that Husband described himself as prospectively being "an employee of a corporation" while the document presented by his counsel apparently represented things quite differently, i.e., that the new business was going to be a partnership.

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[3] In the same order, the court also granted the parties' verbal stipulation (entered into after the court had indicated its intention to deny Husband's motion) to change the support obligation from a family support payment of $3,730 per month to one of $1,665 per month for child support and $875 per month spousal support, for a total of $2,540 per month, effective January 1, 2003.

The trial court also found troubling, again as do we, the fact that the profit and loss statement of Husband's Livermore business showed substantial cash payments to both the Church of Scientology and something called the "Prescott Group," which was apparently related to one of the two persons with whom he was allegedly going into business in Southern California.

But the determinative factor on this appeal is that, as the trial court noted, Husband presented no profit and loss statement for his new Southern California chiropractic business nor any other meaningful evidence to rebut the evidence in the record (evidence in fact reduced to a stipulation) that he had an earning capacity of approximately $8,500 a month. Section 4058, subdivision (b), provides: "The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children." In *Hinman*, we relied upon this language in holding: "The plain language of Family Code section 4058, subdivision (b) and the policies underlying the statute permit consideration of a payor's earning capacity, when consistent with the child's best interests, in order to ensure children's needs are met with appropriate levels of support. [Citation.] Our review of the applicable case law reveals an 'emerging consensus . . . that the only limitations against imputing income to an unemployed or underemployed parent is where the parent in fact has *no* "earning capacity" . . . or relying on earning capacity would not be consistent with the children's best interests. "Bad faith" (deliberate avoidance of family financial responsibilities) is *not* a condition precedent to imputation of income in setting the amount of child support. [Citations.]' [Citation.]" (*Hinman, supra,* 55 Cal.App.4th at p. 998.)

It was not only not an abuse of discretion for the trial court to deny Husband's motion but, based on the total lack of evidence showing either (1) the underlying reason or reasons for the sudden decrease in his earnings or (2) even more importantly, that any such decrease was not temporary, it would have been an abuse of discretion to grant it.

Husband's briefs do not mention that part of the court's order awarding Wife attorney fees of $1,500; any objection to that part of the court's order is thus waived.

IV. DISPOSITION

The order appealed from is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Ruvolo, J.